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No. 04-278

IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHERYN GONZALES, AND LESLIE GONZALES,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent's contention that certiorari is not warranted in this case misconstrues the holdings of the several circuit court decisions in conflict with the *en banc* decision of the Tenth Circuit below, ignores the explicit recognition of that conflict contained in several of the opinions below (both the majority opinion and those of the dissenting judges), and severely downplays the scope of the Tenth Circuit's holding and its incompatibility with this Court's decision in *DeShaney* v. *Winnebago County Department of Social Services*, 489 U.S. 189 (1989). Properly considered, both the extent of

the circuit split and the scope of the Tenth Circuit's holding strongly support review by this Court.

I. The Circuit Split at Issue Here Is Real, Extensive, and Expressly Acknowledged in Several Opinions of the Court Below.

In contending that "no circuit conflict exists" and that the "circuit conflict alleged by Petitioner is illusory," Respondent not only misconstrues the holdings of the conflicting circuits but also overlooks the express acknowledgement of those conflicting decisions in several of the opinions issued by the Tenth Circuit below.

Respondent's sole distinction of the conflicting cases is the unfounded claim that other courts only "addressed arguments that a violation of a state statute *alone* created some kind of protected property interest," whereas the case below involved a "restraining order," "*coupled with* certain statutory language regarding mandatory enforcement of the order." Br. in Opp. at 4, 7 (emphases in original). The crux of Respondent's distinction seems to be that under the decision below a property interest only arises when a general statute is made specifically applicable to a particular individual through some additional step such as a restraining order whose mandatory enforcement is triggered by a *report* of its violation. That distinction, however, does nothing to resolve the conflict.

The conflicting decision of the Sixth Circuit in *Jones* v. *Union County, Tennessee*, 296 F.3d 417, 420 (CA6 2002), clearly involved *both* a restraining order and mandatory language in a state statute. Indeed, the complaint in that case specifically alleged a due process violation from Defendants' "failing to protect Plaintiff from her ex-husband after affirmatively undertaking a duty to do so following the issu-

ance of the *ex parte* order of protection"—the identical claim alleged below.[1]

Similarly, the decisions of the Seventh, Eighth, and D.C. Circuits in *Doe by Nelson* v. *Milwaukee County*, 903 F.2d 499 (CA7 1990), *Doe* v. *Hennepin County*, 858 F.2d 1325 (CA8 1988), and *Doe by Fein* v. *District of Columbia*, 93 F.3d 861 (CADC 1996), respectively, all involved mandatory enforcement language in a statute *coupled with* an individualized report making that mandatory enforcement language specifically applicable to the *particular* individual claiming protection under the statutory scheme. The statutory mandates at issue in all three cases became applicable only after a report of child abuse referencing a particular child was filed, just as the Colorado statutory mandate at issue here became applicable only after a report of some particular conduct prohibited by the protective order. The Seventh Circuit, however, squarely rejected plaintiff's attempt to "circumvent" *DeShaney* by attempting "to assert a violation of their *procedural* due process rights." *Doe by Nelson*, 903 F.2d, at 502. The D.C. Circuit rejected the procedural due process claim as "severely flawed." *Doe by Fein*, 93 F.3d, at 868. And the Eighth Circuit likewise rejected the *Roth*-type claims. 858 F.2d, at 1328. If there is a distinction between those three cases, on the one hand, and the case below, on the other, it is surely a "distinction without a difference," as Judge Kelly noted in his dissenting opinion. Pet. App. 45a.

The Circuit split also was acknowledged in several of the opinions below—expressly in two of the dissenting opinions

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[1] Respondent's further contention, in footnote 2, that "*Jones* specifically addressed the issue of substantive rather than procedural due process" is likewise erroneous. *Jones* specifically rejected plaintiffs' *Roth*-type claim as "misplaced." 296 F.3d, at 429. *Roth*, of course, is the decision of this Court articulating the *procedural* due process claim asserted by Ms. Gonzales below, *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972), not the *substantive* due process claims rejected in *DeShaney*.

and implicitly in the majority opinion. Judge O'Brien noted that the Tenth Circuit was "dramatically separated from other circuits" as a result of the ruling below, including the Sixth, Seventh, and D.C. Circuits. Pet. App. 67a. Judge Kelly found the interest supposedly created by the restraining order to be "too general" to qualify as a protectable liberty interest; the restraining order did not mandate a "certain outcome in which to have a legitimate expectation of entitlement," as required by the Eighth Circuit. Pet. App. 51a (citing *Doe* v. *Hennepin County*, 858 F.2d, at 1328).

Even Judge Seymour, writing for the *en banc* majority, recognized that decisions from the Sixth, Seventh, and D.C. Circuits rejected claims of entitlement to government protection against private violence, in contrast to the Tenth Circuit's recognition of such claims in the opinion below. *See* Pet. App. at 10a n.4 (citing, e.g., *Jones*, 296 F.3d, at 429; *Doe by Fein*, 93 F.3d, at 868-69; and *Doe by Nelson*, 903 F.2d, at 502-03. The grounds upon which Judge Seymour sought to distinguish these cases are simply not sustainable.[2] Judge Seymour held below that the force of mandatory language in a state statute "derives from the existence of a restraining order issued by a court *on behalf of a particular person* . . . ." Pet. App. 18a n.9 (emphasis added). But the broad, undifferentiated mandate of a state statute becomes focused on particular individuals (and hence gives rise to a protectable property interest under the Tenth Circuit's holding) as much by the filing of a specific child abuse report with an executive branch official as by the reporting that a

[2] The Tenth Circuit's subsequent decision in *Jennings* v. *City of Stillwater*, 2004 WL 2044312 (CA10, Sept. 14, 2004), referenced by Respondent, does not make Judge Seymour's attempt to distinguish the conflicting circuit decisions any more viable. Unlike the child abuse reports that were filed in *Doe by Fein*, *Doe by Nelson*, and *Jones*, or the restraining order issued in the present case, there was nothing formally filed in *Jennings* that would focus the generic statutory mandate on a particular individual.

specific restraining order issued by a judicial official has been violated. Indeed, if the Tenth Circuit decision is read to support the proposition that a protectable, *Roth*-type property interest arises *only* when a judicial order is coupled with mandatory language in a state statute, then it would seem that *only* the courts are capable of creating *Roth*-type interests—certainly not a result envisioned by this Court in *Roth* itself.

The Tenth Circuit's misplaced attempt to distinguish the conflicting decisions of its sister courts is therefore no reason to forestall this Court's review, but the attempt does serve to demonstrate that the contrary decisions from the Sixth, Seventh, Eighth, and D.C. Circuits were given full consideration by the *en banc* Tenth Circuit court. There is thus no reason for this Court to await further percolation of the issues presented by this petition

II. The Issue Presented in this Case Will Arise Often Given that Numerous States Have Statutes Requiring Arrest for Probable Violations of Restraining Orders.

Respondent's claim that this case is a unique and fact-bound application of *Roth* is no more accurate than its denial of a split. Even assuming, *arguendo*, respondent's narrow construction of the holding below as limited to situations where a restraining order combines with a statute to create a "property" interest, such situations will arise under numerous statutory schemes throughout the country. As *amici* have noted, 19 states in addition to Colorado require an arrest where there is probable cause to believe that a protective order has been violated. Brief of *Amici Curiae* International Municipal Lawyers Association and National League of Cities ("IMLA Br."), at 5 (citing statutes).

Petitioner provided in its petition a long list of statutes that would create municipal liability, *see* Pet. at 15 n.13, and *amicus curiae* Denver Police Protective Association has pro-

vided several more. We repeat just a few here to reiterate the point. In Massachusetts, "Law enforcement officers *shall* use every reasonable means to enforce . . . abuse prevention orders." Mass. Gen. Laws ch. 209A, § 7. As with the Colorado statutory scheme at issue here, the Massachusetts statute contains mandatory language and is coupled with a particular prevention order. In Minnesota, "A peace officer *shall* arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated [a domestic abuse protection] order." Minn. Laws § 518B.01(e). Again, mandatory language is coupled with a protection order. The same is true in New Jersey, where "The Bureau of Children's Services . . . *shall* upon receipt of [a] report [of suspicious injury to a child], take action to insure the safety of the child." N.J. Stat. Ann. § 9:6-8.18.

The Tenth Circuit's holding will also apply to other statutory provisions in Colorado itself. For example, section 19-3-316(1)(d) of the Colorado Revised Statutes provides: "At any time that [a] law enforcement agency . . . has reason to believe that a violation of [a child protection order] has occurred, it *shall* enforce the order." (Emphasis added). The child protection order, coupled with the mandatory language in the statute, will give rise to constitutional claims of municipal liability for every failure to protect against private violence. Not only will municipal governments be besieged with such claims, but they will effectively become insurers against third party violence should the Tenth Circuit's holding be allowed to stand.

Restraining orders are issued routinely in Colorado and throughout the country in a wide variety of cases. As *amici* have noted, such orders are issued in ordinary criminal cases in addition to domestic violence or custody cases. IMLA Br.. at 4-5. A simple Westlaw search reveals over 4,000

cases discussing violations of restraining orders.[3] And the number of cases that actually made it into Westlaw surely underestimates the number of restraining orders issued, and even the number of violations of such orders, by a substantial amount. In short, there is nothing unique or fact-bound about the circumstances that gave rise to this case, and the Tenth Circuit's rule thus has the potential to spawn thousands of due process claims if left unchecked. The substantial and extremely disruptive potential impact of this case thus warrants this Court's review.

III. The Decision Below Represents a Sweeping Circumvention of *DeShaney*.

Respondent erroneously argues that there is nothing inconsistent between this case and *DeShaney*, and hence the Court should not be concerned. But recasting a *DeShaney* claim as a *Roth* claim is nothing more than sleight of hand. Indeed, as Judge McConnell noted in dissent, the problem here was not that Ms. Gonzalez failed to receive a hearing – she was able to speak to the police and state her case – but rather that the hearing did not produce the result desired. See Pet. App. at 63a (McConnell, J., dissenting) ("She cannot say she was not given a chance to be heard. She called several times and explained the situation to the police, and she met with the police in person both at her home and at the police station. The problem is not that she was denied a hearing, but that the officers failed to do their duty. The problem was with the result."). While the failure to perform a state-law duty may or may not give rise to a state-law claim, if that is all it takes to also state a constitutional claim, and the supposed procedures required are actually a requirement to satisfy the *substantive* duty, then the difference be-

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[3] Search conducted on October 14, 2004 of all federal and state cases using the search phrase violat! /10 restraining /2 order, which yielded 4214 cases.

tween substantive and procedural due process becomes meaningless. *Id.* at 65a ("If the majority is correct, it will always be possible for plaintiffs to re-characterize their substantive due process claims against arbitrary action by executive officials as 'procedural due process' claims, thus avoiding the Supreme Court's exacting 'shocks the conscience' test and getting, instead, the balancing test of *Mathews*. It will always be possible to say that, before they took the complained-of action, the executive officials should have engaged in some additional deliberative process, which might have averted the problem."); *id.* at 66a-67a ("The effect of allowing claims that are essentially substantive to masquerade as procedural is to collapse the distinction between the two components of due process and to expand greatly the liability of state and local governments.").

Even if limited to cases where protective orders are involved, the Tenth Circuit's approach substantially undermines *DeShaney* and shifts constitutional responsibility for private violence onto government shoulders. And, as is more likely, if the reasoning of the Tenth Circuit decision is followed in all cases where a statutory obligation is made specific to an individual in numerous other ways beyond protective orders, then *DeShaney* will become virtually a dead letter. Surely *DeShaney* meant something, and the Tenth Circuit's decision to render it all but nugatory warrants this Court's review.

CONCLUSION

In the end, the fundamental flaw of the decision below remains unanswered: It has constitutionalized state-law procedures for the enforcement of restraining orders by converting such procedures into "property" interests that must themselves be subject to still further procedures as dictated by a federal court. Pretending that such an infinite regression is not a circumvention of the basic principle of *DeShaney* does

not make it so. For the reasons stated above and previously, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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